GIVENS PURSLEY LLP
Attorneys and Counselors at Law

601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Telephone: 208-388-1200
Facsimile: 208-388-1300

www.givenspursley.com

Thomas E. Dvorak
208 388 1245
ted@givenspursley.com

Gary G. Allen
Christopher J. Beeson
Jason J. Blakley
Clint R. Bolinder
Jeff W. Bower
Preston N. Carter
Jeremy C. Chou
William C. Cole
Michael C. Creamer
Amber N. Dina
Bradley J. Dixon
Thomas E. Dvorak
Debora Kristensen Grasham
Martin C. Hendrickson
Brian J. Holleran
Kersti H, Kennedy
Neal A. Koskella
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Kimberly D. Maloney
Kenneth R. McClure
Kelly Greene McConnell
Alex P. McLaughlin
Melodie A. McQuade
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Deborah E. Nelson
W. Hugh O'Riordan, LL.M.
Randall A. Peterman
Jack W. Relf
Michael O. Roe
Jamie Caplan Smith
Jeffrey A. Warr
Robert B. White

Kenneth L. Pursley (1940-2015)
James A. McClure (1924-2011)
Raymond D. Givens (1917-2008)

January 29, 2019

VIA ELECTRONIC MAIL (cdm@msbtlaw.com)
Cherese D. McLain
MSBT Law
7699 West Riverside Drive
Boise, ID 83714

Dear Ms. McLain:

I write on behalf of my client, SUEZ Water Idaho Inc., an Idaho corporation (hereinafter "SUEZ").[1] Your letter of January 14, 2019, addressed to Eagle Water Company, Inc. ("Eagle Water Company"), on behalf of your client, the City of Eagle, has been brought to my client's attention.

I understand that you are representing the City of Eagle in proceedings before the Public Utilities Commission, Case Numbers SUZ-W-18-02 and EAG-W-18-01, and filed a Petition to Intervene on December 21, 2018, and an Amended Petition to Intervene on January 4, 2019 ("Amended Petition"). From having appeared in this case, you know that SUEZ is under contract with H20 Eagle Acquisition LLC, a Wyoming limited liability company (hereinafter "H20"), to purchase certain assets of Eagle Water Company, as that contract is the subject of that proceeding.

The allegations in your Amended Petition and your January 14, 2019 letter were the first time that SUEZ became aware that the City of Eagle claims an alleged right of first refusal stemming from a 2008 Intertie Agreement. I understand from other sources that the City itself "forgot" about this alleged right until shortly before your letter. The Amended Petition itself was apparently filed because the City has "become aware, and is evaluating the meaning and potential applicability, of . . . [an alleged] 'right of first refusal.'" The City's alleged right of first refusal is invalid and unenforceable as (a) the alleged right of first refusal lacks a sufficient legal description for purposes of the Idaho Statute of Frauds; and (b) the City has not exercised said right despite

[1] Incidentally, SUEZ was simply the name change of an existing Idaho company, "United Water Idaho, Inc." and the corporation has existed as an Idaho corporation continually for 91 years.

having notice of a sale or potential sale of said assets for almost four years, thereby invoking bars under the doctrines of waiver and laches against the claimed exercise.

SUEZ expended considerable resources, funds and time in pursuit of its contractual rights and in doing so, reasonably relied upon the absence of any prior assertion of a right of first refusal by the City.

SUEZ is particularly troubled with the fact that a governmental entity seems to have set out to intentionally interfere with a contract between private entities. Such conduct seems very close to conduct that, if proven through further inquiry and discovery in litigation, may represent a deprivation of due process property rights of SUEZ or interference with SUEZ's contract rights under color of state law, in violation of rights protected by the U.S. Constitution, 11 U.S.C. § 1983 as well as the Idaho state constitution. Such conduct, if it indeed occurred, may also result in a claim for violations of anti-trust laws, under the so-called Sham Exception to the Noerr-Pennington antitrust immunity doctrine.

The pertinent background facts as SUEZ currently understands them[2] are as follows.

As early as 2014, the principal at H20, N.L. Bangle, began discussions with the then-mayor of Eagle regarding whether the City of Eagle would be interested in purchasing Eagle Water Company. Those discussions evolved over time to H20 purchasing the assets of Eagle Water Company (the "1st Agreement to Sell") and then essentially wholesaling the water supply to the City of Eagle, which would then own the customers and distribution networks. The city council met with H20 in an Executive session in January 2018 to discuss details of a potential agreement. To that end, the City of Eagle Mayor and several other City officials and employees, attended a tour of the Eagle Water Company's facilities with Mr. Bangle in approximately January 2018. As a result of positive discussions during that tour, Mr. Bangle sent to the City, and you received a copy of, and apparently personally made changes to, a certain Memorandum of Understanding (hereinafter "MOU"). This MOU was transmitted to the City by Mr. Bangle in January 2018. That MOU specifically referenced what was being discussed at the time, H20's purchase of Eagle Water Company. In the very first paragraph of that draft MOU, it states "Seller [H20], **is purchasing** Eagle Water Company located in Eagle, Idaho (the "Project")." (Emphasis added.)

I understand that thereafter you personally attended with Mr. Bangle, Mayor Ridgeway and others, a meeting with a representative of the PUC during which a perceived negative response to Eagle's planned rate increase to the customers of Eagle Water Company by the PUC was brought up. It is believed this PUC meeting to discuss H20 purchasing the assets and wholesaling the water to the City occurred almost a year ago, in February of 2018. Thereafter, Mr. Bangle had limited communications regarding whether Eagle was going to approve the MOU until he received an email on June 13, 2018, from City employee Kellie Rekow indicating that "City council approved the Mayor's signature on the confidential MOU last night" and asking for his signature on the same. Shortly thereafter, Mr. Bangle realized that significant changes had been made to the

[2] This understanding is based on the best information available to SUEZ to date. Information is still being discovered, and SUEZ reserves the right to amend or supplement these facts as new or better information becomes available.

MOU, and he was not willing to sign it with those changes. Mr. Bangle's understanding was that you personally, or your office, had made those changes to the document, and he later received a redline that he understood was from your office showing those changes. Around this time, Mr. Bangle entered into discussions and consummated an agreement to sell H20's rights to purchase the assets of Eagle Water Company to SUEZ (the "2nd Agreement to Sell").

Your client was aware, and incidentally copied you personally, Ms. McLain, of notice of the 2nd Agreement to Sell by November 19, 2018, when the Mayor sent an email to Mr. Bangle that read as follows:

> Norm, from the reports and calls for concerns we have been getting, it appears that you have entered into an agreement with SUEZ for the purchase of Eagle Water Company. I am disappointed that you did not stop by last week as promised to discuss our dialogue. Why would you abandon our agreement is troubling, even more so that you would implore so much of time and commitment from the public utility while all the while negotiating elsewhere.
>
> We're getting calls regarding your "deal" with SUEZ. Although we agreed verbally to a confidentiality and non-circumvention agreement, a signed copy was never sent back to the City of Eagle and therefore, no legal agreement will be honored. Should the public request information regarding these agreements, we are obligated by law to openly share our discussions between the City of Eagle and your company.

Indeed, earlier on November 5, 2018, Mayor Ridgeway forwarded an email from Robin Collins with an article regarding SUEZ's filing for intent to acquire Eagle Water for $10 million to Mr. Bangle, so the City had the information about the 2nd Agreement to Sell by that date as well.

Thus, it was surprising that despite having knowledge of two separate agreements to sell the assets of Eagle Water Company, the City has not attempted to exercise an alleged right of first refusal until your letter of January 14, 2019. It is especially surprising given that you seem personally to have played a role in the discussions from January of 2018 forward, wherein it was clear that the 1st Agreement to Sell the assets of Eagle Water Company to H20 was already in place.

Further, in reviewing the documentation of the communications between H20 and the City, for example, Mayor Ridgeway appears to have misrepresented aspects of those communications. In a blog on December 21, 2018, entitled "Eagle Mayor Stan Ridgeway's blog," he indicates that "the confidential memorandum of understanding was never signed by either party." Yet, an email was sent on June 13, 2018, by City employee "Kellie Rekow" to Mr. Bangle that indicated "City Council approved the Mayor's signature on the Confidential MOU last night. Do you happen to be in town right now for your signature or would you prefer we send to you." Mayor Ridgeway also indicated in that blog apparent surprise when two representatives of Avimor showed up in a

meeting with Mr. Bangle. However, I have reviewed an email dated July 17, 2018 to Mr. Bangle from Mayor Ridgeway where he is asking Mr. Bangle about a call Mayor Ridgeway received from a local developer. Mr. Bangle insists that this email was in fact an Avimor representative and that the inquiry was made first to the Mayor, not to Mr. Bangle.

It is very clear that knowledge of the fact of a sale, even without knowledge of the specific terms of the purported sale agreement, is enough to trigger the duty on the part of the party holding the right of first refusal to take action. *See e.g.*, *Bruns v. Walters*, 28 P.3d 646 (Or. App. 2001) (holding that as soon as a party with right of first refusal learned that the property subject to the right of first refusal had been sold to a third party without notice being given to the right of refusal holder, the time began to run for purposes of the doctrine of *laches*, and that notice of the precise terms of the sale transaction was not necessary). In that particular case, the court held that too much time had passed and delay had resulted in substantial prejudice to the defendants:

> Plaintiff's delay also resulted in substantial prejudice to defendants. "The harm or prejudice to a defendant necessary to the laches defense can be . . . a disadvantageous change in position," . . . "making it inequitable to afford the relief sought against a party asserting laches."

Id. (citations omitted).

Further, Idaho has specifically recognized the application of the doctrine of waiver in the context of a right of first refusal. In the case of *Meridian Bowling Lanes, Inc. v. Meridian Athletic Association, Inc.*, 105 Idaho 509, 670 P.2d 1294 (1983), the court reversed summary judgment and remanded to the district court for a trial on whether a waiver of a right of first refusal had occurred, saying specifically:

> Regardless of whether the right of first refusal was limited to a single bona fide offer or was **continuing in nature**, the question remains whether MBL waived its right when it did not accept the first offer communicated to it by MAA.
>
> > "A waiver is the intentional relinquishment of a known right. It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon."
>
> After an examination of the record, we conclude that whether there was an expressed or implied waiver is clearly disputed.

> "In order to establish a[n implied] waiver the intention to waive must clearly appear, and a waiver . . . will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposite party was misled to his prejudice into the honest belief that such waiver was intended or consented to."

Id. at 512, 670 P.2d at 1297 (citations omitted).[3]

For purposes of both waiver and estoppel, the City has failed for some time to assert this recently discovered alleged right of first refusal. The City has known for years of the attempts to sell Eagle Water Company, but did nothing. The City has been offered Eagle Water Company, but did not seek to purchase. The City has known for over a year of the 1st Agreement to Sell to H20, but simply attempted to negotiate a wholesale distribution agreement from H20. The City has known since November 2018 of the 2nd Agreement to Sell to SUEZ, but has done nothing to assert its claimed right of first refusal. Meanwhile, SUEZ has expended in reasonable reliance upon the City's silence (and to SUEZ's substantial detriment and prejudice) considerable resources, funds and time in pursing the 2nd Agreement to Sell to SUEZ.

This is exactly the sort of substantial prejudice that demonstrates any alleged right of first refusal has been waived by the City, or the City is barred by the doctrines of laches or estoppel from now asserting such a right. In addition, the Idaho Supreme Court over recent years has been very particular about the terms of a contract involving the conveyance of real property pursuant to the statute of frauds being set forth in writing. Particular to the point that a contract that fails the test is completely unenforceable. The statute of frauds provides in Idaho Code § 9-503 that, "[n]o estate or interest in real property…can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." The assets of Eagle Water Company include several water rights as well as underground pipes with easements. Idaho Code § 55-101 provides that, "Real property or real estate consists of: 1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer. 2. That which is affixed to land. 3. That which is appurtenant to land." *See also Fulton v. Duro*, 107 Idaho 240, 243, 687 P.2d 1367, 1370 (Ct. App. 1984), aff'd,

---

[3] *Accord Grover v. Idaho Pub. Utilities Comm'n*, 83 Idaho 351, 357, 364 P.2d 167, 171 (1961)("'A waiver is the intentional relinquishment of a known right. It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon'. . . . In addition to express waiver, this court has recognized a doctrine of implied waiver, under which are consistently applied principles of estoppel. 'The dividing line between waivers implied from conduct and estoppels is often shadowy as the two terms have come to be quite commonly used interchangeably; * * * when the term waiver is so used the elements of estoppel almost invariably appear, and it is employed to designate not a pure or express waiver, but one which has come into the existence of effectiveness through the application of the principles underlying estoppels.'")(citations omitted).

108 Idaho 392, 700 P.2d 14 (1985)("In Idaho, real property includes land, possessory rights to land, and that which is appurtenant to land.").

Idaho courts have fleshed out the requirement under the statute of frauds that all material terms must be in writing, stating that, "[t]he writing must contain all 'conditions, terms[ ] and descriptions necessary to constitute the contract,' including a description of the property to be sold…The property description must be specific enough, either by its own terms or by reference, to ascertain the quantity, identity, or boundaries of the property without resorting to parol evidence…In other words, the description 'must adequately describe the property so that it is possible for someone to identify 'exactly' what property the seller is conveying to the buyer.'" *Callies v. O'Neal*, 147 Idaho 841, 847–48, 216 P.3d 130, 136–37 (2009) (quoting *Lexington Heights Dev. L.L.C. v. Crandlemire*, 140 Idaho 276, 280, 92 P.3d 526, 532 (2004); *Ray v. Frasure*, 146 Idaho 625, 629, 200 P.3d 1174, 1178 (2009)). And, Idaho law has been applied to require that an alleged right of first refusal for a transfer of real estate be in writing as the same is subject to the statute of frauds. *See e.g., Nicholson v. Coeur D'Alene Placer Mining Corp.*, 161 Idaho 877, 392 P.3d 1218 (2017)(Upholding district court's grant of summary judgment against enforcement of oral right of first refusal where district court applied statute of frauds and absence of legal description, and appellate court upheld decision on grounds that legal description was too vague to be enforceable). *See also Magnolia Enterprises, LLC v. Schons*, No. CV-08-376NBLW, 2009 WL 1658022 (D. Idaho June 11, 2009)(unpublished opinion)(applying Idaho cases to reason that because statute of frauds applies to option in Idaho, it would also apply to right of first refusal).

Thus, the alleged agreement for a right of first refusal would seem to fail as not having a sufficient legal description of the water rights and other real property interests in order to satisfy the statue of frauds.

But even if a valid and enforceable right existed in 2008,[4] with respect to waiver of or laches against exercise of the alleged right of first refusal, the Mayor of Eagle, during the City Council meeting that occurred on Tuesday, January 22, 2019, publicly indicated that the "Intertie Agreement has been in the files for quite some time and **was never acted on**. Unfortunately, there is a five-year statute of limitations of payment of $10,000 a month so the roughly $1.2 million that Eagle Water Company was benefiting from the intertie never got paid and we will never see any of that money." The Mayor then goes on to describe how **without knowing this agreement was out there,** he entered into negotiations with Mr. Bangle and that he understood Mr. Bangle got a right of first refusal or some agreement with the owner of Eagle Water Company to be able to sell Eagle Water and that the previous Mayor of Eagle had done this in 2013. It goes on to describe in those minutes how, in 2015, Mayor Ridgeway learned of discussions for sale of Eagle Water as the Council President.[5] Again, providing evidence of a waiver of any alleged right of first refusal due to the failure to act upon the same.

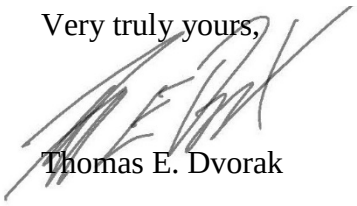
[4] A point which is by no means conceded.

[5] Further, in those minutes, the Mayor erroneously describes the agreement being negotiated with Mr. Bangle and H20 as an agreement for the City of Eagle to purchase Eagle Water Company. This was not the case, as the MOU was

As has been made clear above, SUEZ does not afford any validity to the alleged right of first refusal. SUEZ stands ready to protect its rights under the 2nd Agreement to Sell to SUEZ. Accordingly, SUEZ hereby demands adequate written assurance from the City that the City does not claim a valid right of first refusal. SUEZ believes that fourteen (14) days from the date of this letter should be more than enough time. In the absence of unequivocal written assurance as requested, SUEZ will take appropriate measure to investigate and clear up this delayed claim of an alleged right of first refusal and the propriety of the conduct of all persons involved in making the same. SUEZ will seek to recover all cost and attorneys' fees incurred in doing so, as well as any damages suffered by those actions.

In addition to requiring timely written assurance, demand is also hereby made that a litigation hold be commenced immediately on any and all documentation relating to this matter. More specifics of this hold are described in Exhibit A to this letter. The preservation of documents, both physical and electronic, relevant to a potential lawsuit is required by law. The failure to properly preserve such evidence carries extremely stiff penalties should the court determine that a party has not met its obligations, and sanctions for such spoliation of evidence can include determinations against a party on the merits of the case.

Very truly yours,



Thomas E. Dvorak

cc: Client
TED/SW
14514019_1.docx [30-174]

simply an agreement for wholesale distribution of the water, water that H20 was to provide using Eagle Water Company's assets.

EXHIBIT A
LITIGATION HOLD DEMAND

Please be advised that electronically stored information is an important and irreplaceable source of discovery and/or evidence in the above-entitled dispute. The law requires preservation of all information from your computer systems and those of your agents, managers, employees, etc., as well as removable electronic media and other locations relating to the subject matter of the dispute. This includes, but is not limited to, email, text messages, and other electronic communication, contracts, draft contracts, sub-contracts, plans, bids, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, and network access information.

You should also preserve the following platforms in your possession or any third party under your control (such as an employee or outside vendor under contract): databases, networks, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, laptops, personal computers, internet data, personal digital assistants, tablets, handheld wireless devices, mobile or smart telephones, paging devices, emails and text messages, and audio systems (including voicemail).

You must take every reasonable step to preserve this information until further notice. *Failure to do so could result in extreme penalties against you*. Such penalties include a court deeming your failure to retain and take efforts to retain such information as proof that the missing information would have been damaging to you.

I. PRESERVATION OBLIGATIONS

The laws and rules prohibiting destruction of evidence apply to electronically stored information in the same manner that they apply to other evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, you must take every reasonable step to preserve this information until the final resolution of this matter.

This includes, but is not limited to, an obligation to:

a) Discontinue all data destruction and backup tape recycling policies;

b) Preserve and not dispose of relevant hardware unless an exact replica of the file (a mirror image) is made;

c) Preserve and not destroy passwords, decryption procedures (and accompanying software), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software;

d) Maintain all other pertinent information and tools necessary to access, view, and/or reconstruct all required or potentially relevant electronic data.

II. DESCRIPTION OF DATA SOUGHT

This dispute requires preservation of all information from your computer systems, removable electronic media and other locations relating to the subject matter of the dispute. This includes, but is not limited to, email, text message and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, personal notes, minutes of meetings, and other such items.

A. **Electronic Files**. You have an obligation to preserve all digital or analog electronic files in electronic format, regardless of whether hard copies of the information exist. This includes preserving:

1. Active data (i.e., data immediately and easily accessible on the client's systems today);

2. Archived data (i.e., data residing on backup servers or other storage media);

3. Deleted data (i.e., data that has been deleted from a computer hard drive or server but is recoverable through computer forensic techniques); and

4. Legacy data (i.e., data created on old or obsolete hardware or software).

5. You must preserve active, archived and legacy data including but not limited to:

    a. Word-processing files, including drafts and revisions;

    b. Spreadsheets, including drafts and revisions;

    c. Databases;

    d. CAD (computer-aided design) files, including drafts and revisions;

    e. Presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint);

    f. Graphs, charts and other data produced by project management software or presentation software (such as Microsoft Project or Microsoft Powerpoint);

g. Animations, images, audio, video and audiovisual recordings, MP3 players, and voicemail files;

h. Data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes);

i. Data created with the use of personal data assistants (PDAs), smart phones or tablets, such as iPad, iPhone, Android, or other Windows CE-based or similar devices;

j. Data created with the use of document management software; and

k. Data created with the use of paper and electronic mail logging and routing software.

6. You must preserve media used by your computers including but not limited to:

a. Magnetic, optical or other storage media, including the hard drives or thumb drives used by you;

b. Backup media (i.e., other hard drives, backup tapes, thumb drives, Jaz cartridges, CD-ROMs) and the software necessary to reconstruct the documents;

c. Archived media (you should retain a mirror image copy of any media no longer in service but used during the time periods relevant to the dispute).

B. Hardware. You have an obligation to preserve all electronic processing systems, even if they are replaced. This includes computer servers, stand-alone personal computers, hard drives, laptops, PDAs, and other electronic processing devices. You should retain copies of any hardware no longer in service but used during the time period relevant to this dispute.

C. Emails. You have an obligation to preserve all potentially relevant internal and external emails that were sent or received. Email must be preserved in electronic format, regardless of whether hard copies of the information exist.

D. Internet Web Pages. You have an obligation to preserve all records of any webpages that you have or have had during the time period relevant to this dispute.

E. Supporting Information. You must preserve all supporting information relating to the requested electronic data and/or media including:

1. Codebooks, keys, data dictionaries, diagrams, handbooks, or other supporting documents that aid in reading or interpreting database, media, email, hardware, software, or activity log information.

III. DESCRIPTION OF DOCUMENTS AND MEDIA THAT SHOULD BE PRESERVED

A. Data Preservation. You should immediately preserve all data and information about the data (i.e., backup activity logs and document retention policies) relating to documents maintained in the ordinary course of business relating to the subject matter of this dispute.

B. Data Storage Devices

1. *Online Data Storage.* If you use online storage and/or direct access storage devices, they must immediately cease modifying or deleting any electronic data unless a computer forensic expert makes a mirror image of the electronic file, follows proper preservation protocols for assuring the accuracy of the file (i.e., chain of custody), and makes the file available for potential litigation.

2. *Offline Data Storage.* Offline data storage includes, but is not limited to, backup and archival media, floppy diskettes, magnetic, magneto-optical, and/or optical tapes and cartridges, DVDs, CD-ROMs, thumb drives and other removable media. You should immediately suspend all activity that might result in destruction or modification of all of the data stored on any offline media. This request includes, but is not limited to, media used to store data from personal computers, laptops, mainframe computers, and servers.

3. *Data Storage Device Replacement*. If you replace any electronic data storage devices, you may not dispose of the storage devices.

IV. PRESERVATION COMPLIANCE

A. Activity Log. In order to show preservation compliance, you should maintain a log, documenting all alterations or deletions made to any electronic data storage device or any electronic data processing system. The log should include changes

and deletions made by supervisors, employees, contractors, vendors, or any other third parties.

B. **Chain of Custody.** For each piece of media that you preserve, you must document a complete chain of custody. A proper chain of custody will ensure that no material changes, alterations or modifications were made while the evidence was handled. Chain of custody documentation must indicate where the media has been, whose possession it has been in, and the reason for that possession.

C. **Electronic Data Created after this Letter.** For any electronic data created after this letter or for any electronic processing systems used after this letter, you must take the proper steps to avoid destroying potentially relevant evidence. This includes following the above preservation protocols.

****

Compliance with your preservation obligations includes forwarding a copy of this letter to all individuals within the City or vendor organizations that are responsible for any of the items referred to in this letter and preserving documentation of the timing of your act of doing so. This includes City employees and officials who may maintain such information in their private systems, such as texts on a cell phone. If this correspondence is in any respect unclear, please write to me immediately so that we may clarify any miscommunication.